Supreme Court, U.S.
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No. 97-1790

In The

Supreme Court of the United States

October Term, 1997

MICHAEL LAWSON and EDIE TUCKER,

Petitioners,

vs.

ELRICK MURRAY and BELINDA MURRAY,

Respondents.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The procedural history of this matter through this Court's denial of certiorari, 515 U.S. 1110 (1995) is set forth in petitioners' submission. In June, 1995, Dr. & Mrs. Murray moved from Westfield, New Jersey, to 11 Thistle Lane, Warren, New Jersey. They attempted to make this move without alerting the picketers. No signs were placed on the house in Westfield and it was listed in the wife's maiden name. The plaintiffs told neither their neighbors in Westfield, nor the Westfield Police where they were moving. Despite their best efforts to keep the location of their new residence private, Dr. Murray was certain that his vehicle was followed home from his private office in Plainfield late on a Monday night at the end of October. Two weeks after that incident, the picketers did arrive at the Murrays' new home in Warren.

Prior to being followed from his Plainfield office and subsequent to the Westfield litigation, posters with Dr. Murray's picture were placed on telephone poles in towns throughout New Jersey and postcards were sent anonymously to neighbors with Dr. Murray's face, his addresses and words identifying him as an "abortionist". The poster resembled a "wanted" poster. These incidents caused Dr. Murray concern about his safety and the safety of his family. Petitioner Lawson acknowledged that he ordered and sent the postcards and ordered and placed the posters.

On Sunday, November 19, 1995, the respondents and their family were at an auction when Dr. Murray received a call through his beeper to contact the Warren Police. It was in that setting that respondent was informed that the picketers were going to be picketing at his new home in Warren. Dr. Murray was confident that the Injunction entered in Westfield was applicable to his present residence as well. The respondents left

the auction immediately to return home, but did not arrive until the picketers were leaving.

According to Officer Kingsland, the Supervisor on duty on November 19, 1995, he received a telephone call at around noon from Michael Lawson, who advised that he was coming to Warren to picket at Dr. Murray's house. Mr. Lawson did not know Dr. Murray's precise address when questioned by Officer Kingsland. The Department had been alerted to the fact that Dr. Murray had moved to town and that he had experienced problems with picketers in Westfield. Therefore, Officer Kingsland contacted the Westfield Police Department and received a fax of the Injunction. Officer Kingsland confirmed that he also reached out to notify Dr. Murray of the impending picketing activity. Officer Kingsland communicated with Assistant Prosecutor Cirichella regarding the Injunction who advised that, at least for the day, the Injunction would be enforced. Officer Kingsland met petitioner Lawson as he arrived on the scene of Thistle and Rockage and informed him of this enforcement decision. While petitioner Lawson indicated his disagreement with the position, he agreed to comply with the 100 foot buffer zone. Officer Kingsland overlooked the fact that there were between 15 and 20 picketers present on that date.

The picketers next appeared on December 17. The respondents were surprised by their presence. The family had just returned from church and they were going to Harlem to attend a play when they first saw the picketers. The family drove to Broadway, the street behind Thistle Lane, to observe the picketing activity. Mrs. Murray was anxious for the children to leave when they observed the picketers but the family did not continue into New York, the picketing ". . . messed up our plans".

On January 28, 1996, the picketers reappeared. The Murrays had been informed of the impending picketing and Mrs. Murray

and the children left the home while Dr. Murray remained behind. Mrs. Murray explained that the stress associated with the picketing has increased since the initial picketing in 1991. Starting on Fridays, she is anxious waiting to see if there will be a call that the picketers are going to come on Sunday. In addition, given the continued activities of defendant Lawson, she worries that he is unstable and feels that he is a threat to the safety of her husband and her children. There is almost some relief when they do come because then she knows she has almost two weeks before she begins to worry about their appearing again. The larger the number of picketers the greater the impact according to Mrs. Murray but it is defendant Lawson that causes her the most stress, "But you know if just Michael Lawson was out in front of our home, it would be the same as if 10 or 15 were there. Because I just feel threatened by him being there." Dr. Murray is also concerned about the number of picketers and their proximity to his home. "I think one defendant is sufficiently threatening and then you multiply it by 15. I think we have good reason to be concerned." He would be fearful for his children, ages 11 and 15, who continue to live at home, to be in their front yard when the picketers are there, "We are afraid for our children . . . I think anyone physically at my home uninvited is a threat."

Michael Lawson, age 34, resides in Freehold, NJ, at the home of Edie Tucker. He has resided that for 11 years. For the last six years, he has been employed at A&P on the night crew stocking shelves. Petitioner Lawson has been involved in anti-abortion activities for the last 6 years. While Mr. Lawson claimed to have picketed at clinics other than the one in Howell and at doctors' residences other than that of Dr. Murray, he acknowledged that in the last year, he has not appeared at any other clinic and that within the last year, he has not appeared more than 2 or 3 times at any other doctor's residence. Lawson also admitted that he personally arranged to have the postcards

printed with Dr. Murray's face, addresses and description as an abortionist and that he alone addressed the postcards. He further acknowledged that he never had postcards prepared for any of the other doctors whose homes he had picketed. He acknowledged that he arranged to have the posters in neon bright pink printed with Dr. Murray's picture and he further admitted that he alone put up the posters and that he did not have posters prepared with any other doctor's picture.

Lawson explained that when learning that the Murrays no longer lived in Westfield, he stopped picketing there and undertook efforts to discover where Dr. Murray lived. It was after discovering his new address that he organized the demonstration for his new residential neighborhood in Warren.

At the hearing, the petitioners indicated that if an injunction had not been issued, they would be able to bring many more picketers since the neighborhood can accommodate large numbers of people. The trial judge found that the only reasons the respondents were not under siege in Warren was due to an injunction being in place. Pa at 19a-20a. The trial judge conducted an extensive comparative analysis of the Murrays' residence in Westfield, NJ, with their new residence in Warren Township. Pa at 21a-23a. Based upon that comparison and an analysis of the New Jersey Supreme Court decision in *Murray v. Lawson*, the trial judge crafted restrictions that burden no more speech than is necessary to protect the Murrays' residential privacy interests. Those restrictions varied from the Westfield restrictions in terms of the buffer zone itself and the number of picketers permitted. In Westfield, there was a buffer zone extending 100 feet from the boundary of the Murray property. In the instant case, picketers were prohibited from picketing within a buffer zone coterminous with the sidelines of the Murray residence. In Westfield, the number of picketers was limited to ten; in the instant case the number was expanded to fifteen.

REASONS FOR DENYING THE WRIT

Contrary to petitioners' histrionics and hyperbole, the New Jersey court decisions do not conflict with decisions of lower federal courts or of this Court. The decision below faithfully applies this Court's decision in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), to facts set forth in a comprehensive record developed by the trial court. It carefully adjusted the free speech rights of petitioners, and the state's and respondents' interests in residential privacy, so as to "burden no more speech than necessary" to protect those interests. The writ, therefore, should be denied.

I.

THE INJUNCTION AT ISSUE IN THIS CASE IS NOT A PRIOR RESTRAINT.

Petitioners argue, as they have in previous petitions to this Court, that the injunction at issue here is unconstitutional as a "prior restraint". This Court's decision in *Madsen*, however, categorically rejected this argument.

In reviewing the propriety of an injunction creating a 36-foot no-picketing "buffer zone" around a Florida abortion clinic, this Court said the injunction was not a prior restraint for two reasons, both of which apply here. First, unlike valid time, place and manner regulations, prior restraints absolutely ban a message in advance of publication. In contrast, the "petitioners [in *Madsen*] are not prevented from expressing their message in any one of several ways; they are simply prohibited from expressing it within the 36-foot buffer zone." *Madsen*, 114 S. Ct. at 2524 n.2. Similarly, here petitioners are simply prohibited from expressing their message within a buffer zone coterminous with the sidelines of the respondents' residence. Outside that

zone, they are free to display any message they please. Moreover, under the terms of the present injunction, that message is in full sight of all who care to view it, even the Murrays, should they look out their window or step outside their home.

Second, this Court said in *Madsen* that "the injunction was issued not because of the content of petitioners' expression . . . but because of their prior unlawful conduct." *Id.* The same analysis applies here. The New Jersey Chancery Court issued the injunction, not to quash respondents' message, but to prevent a method of expression that this Court has acknowledged "inherently and offensively" intrudes on residential privacy. *Frisby*, 487 U.S. at 486.

Petitioners misconstrue this last statement from *Madsen* to mean that a finding of prior unlawful conduct is a precondition to a finding that an injunction aimed at picketing is not a prior restraint. The New Jersey Supreme Court correctly rejected this argument. The correct constitutional inquiry, as stated in *Madsen*, is whether the restraint can be justified other than by reference to the content of the message. Nothing in *Madsen* or any other case suggests that prevention of unlawful conduct is the only non-content-based rationale that takes an injunction out of the category of prior restraints. Indeed, in *Madsen*, this Court did not find the trial court's injunction a prior restraint, despite the fact that no crime or tort had been committed by the demonstrators in relation to that activity.

II.

THE PETITIONERS ENGAGED IN TARGETED PICKETING AND, THUS, THE INJUNCTION ENTERED WAS PROPER TO PROTECT THE RESPONDENTS' RESIDENTIAL PRIVACY.

Petitioners present the novel argument that the picketing in the instant case was not "targeted picketing" and that the trial judge erred in designating the picketing as targeted based upon plaintiff's identity on the signs. To suggest that the injunction is content-based, as petitioner does in paragraph III of their petition because the "content" of the sign is relied upon to designate that the picketing is targeted, is absurd. Moreover, respondents did not rely exclusively on the signs as evidence of targeted picketing. The trial judge considered the prior conduct of the petitioners as well as the conduct in Warren before determining that the petitioners engaged in targeted picketing. Petitioner Lawson testified that upon learning that the Murrays no longer lived in Westfield, he stopped picketing there and he investigated property records to discover where they had moved. He notified the Warren police that he was coming to picket in Warren at Dr. Murray's residence. Within the year prior to the trial, petitioner Lawson's anti-abortion activities have been consumed with Dr. Murray.

Petitioners would have the Court operate under the fiction that this case began on November 19, 1995 and ignore the history between the parties. It is entirely appropriate and, in fact, necessary that the Court consider the history between the parties commencing on January 20, 1991. PA at 18a. With that background, any suggestion that the petitioners did not intend to engage in targeted picketing with the Murrays being the target belies logic and must be rejected. This specious position offered by petitioners has been rejected in *State of Arizona v. Baldwin*,

908 P.2d 483 (Ct. of App. Arizona 1995). In that case, the court upheld a residential picketing statute in the conviction of an abortion protester despite the defendant's claim that he was not engaged in "targeting picketing". Despite the protester's claim that he was not targeting the doctor because he walked the entire length of the street, the court found targeting on the basis of the protester's statement to the doctor that he "was going to hell for killing babies". Also of note in that court's decision is the discussion of the captive nature of the residential listener when faced with even an unobtrusive lone picketer. *Id.* at 488.

People v. Holman, 630 N.E. 2d 154 (Ill. App. Ct. 1994) does not compel a different result. In this Illinois case, defendant was arrested for violating the statute prohibiting residential picketing. The issue on appeal was whether evidence of prior picketing should be admitted at trial. The ruling that this evidence should be precluded as being extremely prejudicial in a criminal case does not support petitioners' argument that they were not engaged in targeted picketing in the context of this case.

Petitioners' feeble attempt to limit targeted picketing to focused picketing taking place solely in front of a particular residence is not supported by the caselaw despite their desperate reliance on Justice Scalia's dissent at 115 S. Ct. 264-65. Both the *Madsen* Court and the *Murray* Court rejected the narrow reading of *Frizby* espoused by petitioners herein which would permit a prohibition on picketing which occurred only directly in front of the target's residence. In *Madsen*, this Court ruled that while the record before it did not justify a 300 foot picket-free zone around the homes of staff members of a Florida health clinic, "It appear[ed] that a limitation on the time, duration of picketing, and a number of pickets *outside a smaller zone* could have accomplished the desired result." *Madsen*, 114 S. Ct. at 2530 (emphasis added). This Court plainly contemplates small

picket-free zones as permissible means of serving the state interest in residential privacy. The New Jersey courts did not err in creating such a zone. *Madsen* did not establish how large the smaller zones should be, leaving that task to trial judges to determine, based on the facts of the individual case, keeping in mind the new standard that the injunction should burden no more speech than necessary to serve the state's significant interests.

Despite petitioners' assertion that New Jersey is the only court that has not limited its definition of targeted picketing to maintaining a physical presence directly in front of a specific residence and nowhere else, the cases cited by petitioner are either consistent with the within ruling or distinguishable from it in a factual context.

The dissenting opinion of Judge Boyce F. Martin, Jr. in *Vittitow v. City of Upper Arlington*, 43 F.3d 1100 (6th Cir. 1995) provides a persuasive discussion of this issue.

> Thus, I believe that the picketers may be prevented from engaging in targeted picketing, even when their method of targeting includes slow marching, if their method of picketing continues to infringe on the privacy interests mentioned above, when, for example, the picketers create a situation where the target of the picket is a captive audience or whose residence is under siege. Merely because the plaintiffs chose to march slowly by other residences, as well as the targeted residence, does not insulate their activity from regulation. The targeted homeowner is as much a captive audience when picketers repeatedly march in front of a home as when they are standing still. The psychological injury and

> disturbance to the tranquility of the home are not reduced because the picketers are marching slowly.

Id. at 1111.

In *Vittitow*, anti-abortion picketers filed suit claiming a town ordinance that prohibited picketing "before or about" any residence was unconstitutional. The trial court issued an injunction that attempted to narrow the scope of the ordinance to the area in front of a targeted residence or "the two homes on either side" of the targeted residence. The Sixth Circuit stated that the narrowing injunction was unconstitutional because it created a no-picketing zone beyond the area "solely in front of a particular residence." 43 F.3d at 1105 (citing *Madsen*, 114 S. Ct. at 2530). Appellants claim this holding conflicts with the decision of the New Jersey Supreme Court creating a no-picketing buffer zone of 100 feet on either side of the Murrays' residence.

The *Vittitow* injunction, however, interprets a statute of general applicability, unlike the injunction in this case, which adjusts the rights of private parties based on the facts of an individual case. As the Sixth Circuit recognized,

> This is not a case where the target of the picketing has come to court seeking an injunction. In such a case, the trial judge rightfully undertakes to define the rights of the parties in an appropriately worded injunction, if an injunction is called for. Here, however, an ordinance was at issue.

43 F.3d at 1107. An injunction interpreting an ordinance to place demonstrators two houses away from their target throughout an entire town will have varying effects on speech depending on the neighborhood where the picketing is taking

place. Such an injunction may well therefore burden more speech than necessary to serve the interests of residential privacy. It is such a "one-size-fits-all" injunction that the Sixth Circuit held to be beyond the scope of this Court's decisions in *Frisby v. Schultz*, 487 U.S. 474 (1988), and in *Madsen*. *Vittitow*, 43 F.3d at 1107.

In contrast, in this case "the target of the picketing has come to court seeking an injunction" and the court has "define[d] the rights of the parties in an appropriately worded injunction." 43 F.3d at 1107. That injunction, pursuant to the dictates of *Madsen*, has been crafted to burden no more speech than necessary, in light of the facts of the case, to serve the state's interest in residential privacy.

It is respectfully submitted that if *Vittitow* does interpret *Madsen* to forbid no-picketing zones larger than the frontage of a residence when private parties seek relief in a particular case, *Vittitow* is wrong.[1] The Supreme Court in *Madsen* struck an injunction providing a 300 foot no-picketing zone because it was "much larger" than the zone provided for in the ordinance approved in *Frisby* and it appeared that a smaller zone could have accomplished the desired result. 114 S. Ct. at 2530.

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1. In like manner, to the extent that *Hanzo v. deParrie*, 152 Or. App. 525 (1998) and *Lucero v. Trosch*, 121 F.3d 591 (11th Cir. 1997) stand for this narrow interpretation, they are also inconsistent with *Madsen*. The factual settings in these two cases also distinguish them from the case under review. In *Hanzo*, the court was dealing with an anti-abortion appeal of a permanent civil Stalking Protection Order, SPO, obtained by an abortion provider. The court found that the "contacts" were insufficient to support the SPO. In *Lucero*, the court was faced with a blanket 200-foot buffer zone injunction that protected the residences of all the clinics' staff members. The ruling that this injunction was too broad has little relevance to the within injunction which protects one individual who has been the target of anti-abortion activity since 1992.

In like manner, the petitioners' reliance on *Kirkeby v. Furness*, 92 F.3d 655 (8th Cir. 1996) is misplaced. The court in *Kirkeby* recognized that its decision was fact sensitive and cautioned against extending the ruling to other factual settings as it referred approvingly to *Douglas v. Brownell*, 88 F.3d 1511 (8th Cir. 1996) where it upheld a three house zone in a residential picketing case. *Douglas* involves a challenge by anti-abortion picketers to two ordinances enacted by the City of Clive, Iowa. The decision is particularly noteworthy in the instant review since the court grapples with the same cases that must determine the outcome of this case.

The *Douglas* court rejected the proposition that *Frisby* and *Madsen* allow an absolute ban on picketing only in the area directly in front of the targeted residence.

> We do not read *Frisby* as establishing a bright-line rule authorizing a limit on picketing only in the area directly in front of the targeted residence. The Court's concern in *Frisby* was not so much the size of the prohibited zone, but the impact the ban had on protected activity. The Court stressed that the ordinance applied to picketing "focused on" and "directed at" a particular residence. *Id.* at 482-83, 108 S. Ct. at 2501-02. The Court found residential picketing different from other forms of communicative activities, such as door-to-door solicitation and the distribution of handbills, because the targeted resident cannot avoid the picketers. The Court emphasized: "[t]here simply is no right to force speech into the home of an unwilling listener." *Id.* at 485, 108 S. Ct. at 2503. Although the Court in *Madsen* repeated the language that *Frisby* prohibited only "focused picketing taking place solely in front of a particular residence," the Court considered an injunction, not an ordinance, and a 300-foot buffer zone, not an area covering the particular residence and the two adjacent houses . . .
>
> Obviously, there is a direct relationship between the size of the prohibited zone and the impact on protected speech. Nevertheless, we do not read *Frisby* as requiring us to strike down the ordinance as not narrowly tailored simply because the ordinance extends beyond the area solely in front of the targeted residence.

Id. at 1519-1520.

The Eighth Circuit upheld the ordinance recognizing that it preserved ample alternative channels of communication for the picketers.

It would appear that *Copper v. City of Fargo*, 905 F. Supp. 680 (D.N.D. 1994) is overruled by *Douglas* to the extent that it holds that an ordinance will only pass constitutional muster if it is construed to prohibit only focused picketing taking place solely in front of a particular residence. Therefore, appellants' reliance on that case herein is misdirected.

In like manner, the factual setting of *Planned Parenthood Ass'n v. Operation Rescue*, 50 Cal. App. 4th 290, 57 Cal. Rptr. 2d 736 (1996) differs so from the instant case that its holding has little relevance herein. The expectation of privacy when residing in an apartment building cannot be compared to the tranquility sought by the Murrays when they moved to Warren, NJ. It is noteworthy, however, that in referring the matter back to the trial court to determine what is appropriate, the Court of Appeals suggested limitations regarding the number of picketers, the time of picketing and the days of picketing and also

suggested an advance notice requirement citing approvingly *Murray v. Lawson*. *Id.* at 743.

In similar fashion, petitioners' reliance on *City of Seven Hills v. Aryan Nations*, 667 N.E. 2d 942 (Ohio 1996) is misguided in view of the striking dissimilarities between the cases. That case involved an injunction against simultaneous picketing by a Jewish group engaged in residential picketing in front of the target whose conviction for Nazi war crimes had been reversed by the Israeli Supreme Court and by members of the KKK. The single issue addressed by the court was whether a permanent injunction prohibiting simultaneous picketing by groups with opposing viewpoints violated the Constitution. The findings in this content-based permanent injunction case are simply inapplicable to the case under review.

In *City of San Jose v. Superior Court of Santa Clara County*, 38 Cal. Rptr. 2d 205-212 (Ca. Ct. App. 6th Dist. 1995), the Court in a post-*Madsen* case approved a legislative judgment that

> . . . Picketers assembled at or near to the borders of a home create virtually the same invasion of residential privacy for its occupants and instill identical feelings of captivity, fear and intimidation . . . as do picketers directly in front of the residence.

Petitioners' reliance on *City of Prairie Village v. Hogan*, 855 P.2d 949 (Kan. 1993) is understandable, but superficial. Defendant in that case was prosecuted under an ordinance that bans picketing "before or about a Church". Defendant carried anti-abortion signs on a three block route that included the Village Presbyterian Church. He chose that area to picket because of the probability of a high concentration of "Christians". The Supreme Court of Kansas narrowly interpreted the ordinance

to prohibit only focused picketing taking place solely in front of a particular Church. The court pointed out that the defendant was not protesting the Church, its teaching or its members and, therefore, concluded that he was not picketing a Church within the meaning of the ordinance. It is respectfully submitted that it does not follow by analogy that the petitioners herein are not engaged in focused picketing because they choose to walk beyond the Murray residence. In *City of Prairie Village*, the **Church** was not the target of the picketing while in the instant case, the **Murrays' residence** is the target of the picketing.

A post-*Madsen* case decided by the Texas Appellate Court is relevant and instructive as to the issues considered herein. In that matter, *Operation Rescue v. Planned Parenthood*, 937 S.W. 2d. 60 (Tex. App. - Houston [14th Dist.] 1996), Rehearing Overruled January 23, 1997, an action was brought by doctors who perform abortions and ten women's clinics. The trial judge initially entered a temporary restraining order establishing a 100-foot buffer zone of clinics and homes. The Texas Supreme Court ruled that this was not the "least restrictive" means to protect significant governmental interests and the matter was referred back to the trial court. Following a six week jury trial, a Judgment was entered awarding damages and permanently enjoining anti-abortion picket groups from demonstrating within a specific zone for each clinic ranging from 15 to 32 feet and, more importantly for our purposes, a 13-foot buffer zone was established from the property line of each physicians' residence. This residential buffer zone was discussed and upheld by the Appellate Court. *Id.* at 81 and 82. It is respectfully submitted that in similar fashion, the well-reasoned decision of Judge Diana, which erected a less restrictive zone of privacy than the Texas Court, should be upheld.

Petitioners' reliance on *Tompkins v. Cyr*, 1998 W.L. 21650 (N.D. Tex., January 7, 1998) is misguided. While the case did

involve an injunction against anti-abortion picketers, the decision is substantially devoted to an analysis of the 8.5 million dollar jury verdict against 11 abortion protesters on the basis of tort liability. What is significant for our purposes is the fact that the court held that focussed residential picketing is outrageous per se. at 15. In addition, the *Tompkins* court interpreted *Madsen* to approve the creation of a smaller "buffer zone" in a residential picketing case, at 22, as did the New Jersey Supreme Court in the original *Murray v. Lawson* and the lower courts in the *Murray* case presently under review. While it is true that the *Tompkins* court found that two of the picketers did not engage in "targeted picketing", it must be emphasized that the finding was made in the context of assessing tort liability, not an injunction. In addition, the finding was based on the absence of facts to establish targeted picketing as to those two individuals. In the instant case, the petitioners never attempted to establish separate defenses to a finding of targeted picketing. Moreover, the record established both individual and group conduct to warrant the finding.

Finally, while it is true that no buffer zone was erected by the *Tompkins* court, that ruling was based on the peculiar factual setting of the case wherein the plaintiff and his family had moved from the house where the picketing took place and they did not offer any evidence regarding the location or parameters of their current residence. at 22. In the instant case, the location and parameters of the Murray residence in Warren were carefully examined and a buffer zone was tailored so as to burden no more speech than is necessary to serve the Murrays' residential privacy, a significant government interest.[2]

Despite petitioners' colorful, barbed attacks on the restrictions crafted by the trial judge, it is quite apparent that

2. It is noteworthy that petitioners failed to address the fact that the *Tompkins* court limited the number of picketers, the duration of the picketing and the time of day of the demonstrations. *See* Point III below.

Judge Diana carefully reviewed this Court's analysis in *Madsen* and the New Jersey Supreme Court ruling in *Murray v. Lawson* which interprets that decision, and after careful consideration of the differences in the properties, crafted a new set of restrictions. In view of the greater setback in Warren, the Judge restricted the petitioners from picketing within the property line of the respondents. While this may place the picketers the same distance from the Murray home as the Westfield injunction, it deprives the respondents of the use of their front yard to a greater extent than the Westfield injunction. This specific tailoring of the buffer zone is yet further evidence that the injunction burdens no more speech than necessary to protect the Murrays' privacy and it should be upheld.

Finally, petitioners' provocative, yet unsupported statement that New Jersey courts discriminate against pro-life picketers must be addressed. Petitioners contrived this theory after a permanent injunction was entered and in reliance upon unpublished interim court proceedings in unrelated factual settings. Petitioners' effort to sully the impeccable record below is spurious and claims of discrimination against pro-life picketers should be rejected.

III.

THE TERMS OF THE PERMANENT INJUNCTION DO NOT BURDEN MORE SPEECH THAN IS NECESSARY.

Petitioners grossly exaggerate the impact of the limited buffer zone established by the trial judge in this case. In comparing the respondents' previous residence and neighborhood with the present setting, the trial judge reduced the buffer zone from an area within 100 feet of the property line of the Murrays' residence to an area coterminous with the

sidelines of the Murrays' residence.[3] Petitioners' concern that the Murray house cuts this lane in two and, thus, prevents picketing on both sides of the Murray residence can easily be cured by simply having half of the picketers on one side of the residence and half on the other side. As an alternative, one half of the time can be spent with all of the picketers on one side of the residence and one half of the time can be spent with all of the picketers on the other side. The minimal time spent driving around the block is not significant since petitioners admitted in testimony that they do not remain in the area for the entire designated hour.

Petitioners also argue that the requirement that they notify the police twenty-four hours in advance of a demonstration violates the First Amendment. This argument ignores the Supreme Court's holdings that even requirements for parade permits are permissible when the official's decisions on whether to grant or deny the permit are based on "narrow and definite" criteria that do not allow discriminatory administration because the official disagrees with the content of the speech. *Cox v. New Hampshire*, 312 U.S. 569 (1941). Such a permit system "giv[es] . . . public authorities notice in advance so as to afford opportunity for proper policing." *Id.* at 576. Here, of course, only notice is required; the police have no authority to prevent petitioners from picketing.[4]

Despite petitioners' reliance on *Rosen v. Port of Portland*, 641 F.2d 1243 (9th Cir. 1981), that case does not compel a different result herein. *Rosen* involved an ordinance that was enforced against

3. It is noteworthy that in Petitioners' prior petition to this Court, they stated, "Respondents' privacy interests are limited to the borders of their own property." Pet. Brf. at 28. It is fascinating how that espoused position changed once that precise position was adopted in a new setting.

4. Ironically, appellants have voluntarily notified the police prior to their demonstrations both before the New Jersey Supreme Court's ruling and in other residential picketing incidents.

an individual seeking to distribute literature at an airport as a member of "Jews for Jesus". While holding that the ordinance swept too wide in its regulation of the individual, the court distinguished this case from one it had earlier decided where an advance notice requirement was upheld in an injunction where the need for notice was demonstrated. Footnote 9 *Id.* at 1248.

In the instant case, Officer Kingsland explained in a convincing manner that it was necessary for the police department to be forewarned of the picketing activity so as to assure proper staffing. The trial judge found that testimony to be convincing and held,

> According to the testimony of Officer Kingsland, in order to ensure that there is adequate staffing available, the Warren Police needs proper notification of the demonstration. Therefore, the twenty-four hour requirement is necessary to protect public safety.

Relying on the New Jersey Supreme Court decision and the testimony presented, Judge Diana concluded,

> With regard to the limitation as to time and hours, again quoting from *Murray*, 138 N.J. at 235,
>
> > [f]urther, the picketing every two weeks limitation allows defendants to demonstrate often enough to communicate their message without subjecting the Murrays to a constant barrage of picketing [, and] the duration limitation gives defendants plenty of time in which to convey their message each time they picket.

It is respectfully submitted that the reasonable limitation as to number, time and hours together with the advance notice requirement permit petitioners a strong enough showing, consistent with the residential nature of the neighborhood and the Murrays' privacy, that their message does not seem marginalized. It is noteworthy that the trial judge in this action expanded the number of picketers that the New Jersey Supreme Court permitted in *Murray v. Lawson* from ten to fifteen in consideration of the differences in the neighborhoods. In short, the trial judge's careful consideration of the neighborhood and his tailoring of the time, place and manner restrictions should serve to completely thwart petitioners' attempts to revisit the restrictions imposed.

CONCLUSION

The New Jersey courts faithfully applied this Court's precedents to craft an injunction that burdens no more speech than necessary to serve the state's significant interest in protecting residential privacy. The petition for certiorari should be denied.

Respectfully submitted,

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